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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 959 61

THE UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

SEATRAIN LINES, INC.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

MOTION TO DISMISS OR AFFIRM

CALEB R. LAYTON, 3rd,
Counsel for Appellee.

WILBUR LA ROE, JR.,
FREDERICK E. BROWN,
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PARKER MCCOLLESTER,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE

Civil No. 579

SEATRAIN LINES, INC.,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
Defendants-Appellants.

MOTION OF SEATRAIN LINES, INC., TO DISMISS OR AFFIRM

Filed March —, 1946. Clerk, U. S. Dist. Court

Appellee, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the appeal be dismissed or in the alternative that the judgment of the District Court be affirmed.

This is an appeal from a judgment of a three-judge statutory court in the District of Delaware setting aside and annulling an order of the Interstate Commerce Commission cancelling a certificate issued to Seatrain Lines, Inc. authorizing it to operate between New York, New York, and New Orleans, Louisiana, and between New York, New York, and Texas City, Texas.

On July 2, 1942, the Commission granted to appellee, hereinafter sometimes for convenience referred to as Sea-

train, a certificate as a common carrier of commodities generally between the ports named. Two and one-half years later, after Seatrain had spent large sums in reliance upon the original certificate, the Commission cancelled the certificate and issued a new certificate which changed the status of Seatrain from that of common carrier of commodities generally to that of car ferry.

The lower court set aside and annulled the Commission's new order amending the certificate on the grounds that the Commission lacked statutory authority to revoke or cancel a certificate or to limit it in any substantial fashion and on the ground that Seatrain was deprived of property without compensation and without due process of law under the certificate as amended.

Motion to Dismiss or Affirm

Appellee moves that the appeal be dismissed or in the alternative that the judgment of the District Court be affirmed for the following reasons:

1. The Interstate Commerce Commission is without statutory power to revoke or cancel a certificate issued to a common carrier of commodities generally by water.

2. The Commission may not under the Fifth Amendment to the Federal Constitution, after having issued a certificate to such carrier, cancel or revoke it, or substantially withdraw the rights granted, after the grantee has acted upon it and spent large sums of money in reliance upon it.

Argument in Support of the Motion

I

The Interstate Commerce Commission is entirely without statutory jurisdiction to revoke a certificate issued to a common carrier of commodities generally by water.

Although express statutory power to revoke a certificate is contained in section 212(a) of Part II of the Interstate Commerce Act as to motor carriers (U. S. Code, Title 49, Section 312), and also in section 401(h) of Civil Aeronautics Act as to air carriers (U. S. Code, Title 49, Section 481), there is no corresponding provision in Part III of the Interstate Commerce Act. Not only that, but the Commission asked Congress not to give it that power. The Congress, which five years before (in 1935) had given the Commission power to revoke the certificates of motor carriers, was studying S. 2009, which later became the Water Carrier Act (Part III of Interstate Commerce Act) and sought the Commission's advice as to various aspects of the bill, including the matter of revocation of certificates. On January 29, 1940, a report was made to the Congress by Commissioner Eastman, Chairman of the Commission's legislative committee, which included the following paragraph:

> "House bill.—This bill leaves section 212(a) unchanged, and has no corresponding provision in the new part III. While there is room for argument, *we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III.* Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties;

but this should not be true of water carriers." (Emphasis supplied.)

Appellants argue that "the second certificate is in reality broader than the original certificate for the reason that the latter did not give Seatrain the right to transport empty freight cars, which right the second certificate confers." The obvious fact is that whereas Seatrain was originally granted a broad certificate to operate as a common carrier of commodities generally between New York and New Orleans and between New York and Texas City, with no restrictions except as to geographical limitations, the new certificate, issued 2½ years later, revoked to such an extent the original grant that Seatrain can no longer receive traffic from its own shippers or deliver traffic to its own consignees or serve the freight stations named in its duly published tariffs or receive traffic from or deliver traffic to common carriers by motor vehicle or interchange traffic with other common carriers by water or receive traffic from lighters or deliver traffic to lighters or handle traffic in any manner other than in a railroad car. This almost unbelievable cancellation or withdrawal of rights originally granted results from the following language in the new certificate:

> "of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars * * *."

Clearly under this wording Seatrain must confine its operations to pure car ferry or bridge service between railroads.

If it was the intent of the Commission to give Seatrain more rights than it had originally, the intent has not been carried out because the effect of the amended certificate is to change completely the status of Seatrain from a common carrier of commodities generally to a mere car ferry or bridge carrier.

The Commission claims that the right to revoke a certificate may be implied from section 315(c), Part III, Interstate Commerce Act, which deals with orders. The wording of the section is as follows:

> "(c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper."

Clearly the foregoing paragraph relates to mere regulatory orders and not to certificates. In no part of the Act dealing with certificates are they referred to as orders. There is a vast legal distinction between a certificate and a regulatory order and since the power to revoke a certificate is expressly given in the Motor Carrier Act and in the Civil Aeronautics Act it should not be derived by implication in Part III where the power to revoke was withheld upon the recommendation of the Commission itself.

Nor can the Commission derive the power to revoke, as it seeks to do, from section 309(d) which authorizes it to attach reasonable terms, conditions and limitations *to the exercise of the privileges granted.* There is a vast difference between attaching reasonable conditions to the *exercise* of the rights and the revocation or substantial withdrawal of the rights themselves.

II

Certificate rights cannot be revoked or substantially withdrawn without violating the Fifth Amendment

During the period of 2½ years which elapsed between the granting of the original certificate and its cancellation appellee reacquired from the Government title to certain vessels, waiving its right to claim just compensation for the full value of the vessels and waiving its right to insist that the government recondition them. The worth of these

vessels was approximately $7,700,000 and the cost to Seatrain of reconditioning them for operation under the amended certificate would be $2,100,000. In addition, Seatrain purchased terminal properties in New York harbor at a cost of $200,000, and spent $140,000 a year to maintain its coastwise organization and facilities. The evidence shows that these monies would not have been spent if the amended certificate had been in effect.

Certificates are issued in perpetuity. They are the equivalent of perpetual franchises. When such a grant is accepted and acted upon by the grantee it becomes a contract with the government which cannot be revoked or repealed unless the power to repeal was clearly and unmistakably reserved. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58; *Frost* v. *Corporation Commission*, 278 U. S. 515.

Prayer for Dismissal or Affirmance

It is clear from the foregoing that the Commission acted without statutory power. There is no longer any doubt under the decided cases that a certificate constitutes a contract between the holder and the government which may not be revoked unless the power to do so is expressly reserved. The judgment of the Court below should be affirmed and the appeal dismissed.

Definitive determination of the matter by affirming the judgment below is doubly necessary because, as the record shows, Seatrain has received notice of the return of its vessels requisitioned by the Government, and it knows not which way to turn until this issue is adjudicated. And, as the Court will appreciate, there is in the meantime a cloud on the certificates of all common carriers by water so long as the Commission can claim the authority to withdraw operating rights by revocation or cancellation, in

whole or in part, of certificates theretofore granted by it as if said certificates were mere regulatory orders.

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March 12, 1946.

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